Shum Kai Cheong v See Too Woon Yee

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-22-2 OF 1997
ABDUL KADIR SULAIMAN J
10 AUGUST 1998

Civil Procedure *— Interrogatories — Application for leave to deliver — Application after close of pleadings — Whether necessary to give explanation for delay — Whether merit of application is relevant — Rules of the High Court 1980 O 26 r 1(1)*

The appellant, after the close of the pleadings, applied pursuant to O 26 r 1(1) of the Rules of the High Court 1980 for an order giving him leave to serve interrogatories upon the respondent. The senior assistant registrar dismissed the application on the ground that the appellant did not give any reason for the delay in the application which was made after the close of the pleadings. It was submitted that O 26 r 1 does not prescribe any time period for such an application to be made and that all that is necessary for the court to consider is whether the proposed interrogatories are relevant and necessary either for disposing fairly of the course or matter or for saving costs.

Held, dismissing the appeal:

(1) Interrogatories is a matter of right if made before the close of pleadings. However, leave to deliver interrogatories is necessary when made after the close of pleadings. The court would then have the discretion to decide whether to grant or refuse the leave sought. In such instance, the satisfactory explanation for the delay is a prerequisite. In this case, the appellant gave no explanation at all for such a delay except to explain the need for such interrogatories. Therefore, the senior assistant registrar was correct in dismissing the application for lack of explanation for the delay (see pp 159D–I and 160A–B).

(2) The issues of delay and merit are not to be taken as separate issues in an application for interrogatories. Merit is relevant only if the position relating to delay is even in that in the balance between the granting or refusal of the leave sought, having considered the explanation put forward for the delay, something else is necessary to tilt the balance one way or the other. In the circumstances of this case, in view of the delay in the filing of the summons until the close of the pleading, which delay remained unexplained, the merit if any was of no relevance at all (see p 160B–E).

[Bahasa Malaysia summary

Selepas penutupan pliding, perayu telah memohon menurut A 26 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu perintah

yang memberikannya kebenaran untuk menyampaikan interogatori kepada penentang. Penolong kanan pendaftar telah menolak permohonan atas alasan bahawa perayu tidak memberikan sebarang sebab untuk kelewatan dalam permohonan yang dibuat selepas penutupan pliding. Ia dihujahkan bahawa A 26 k 1 tidak menetapkan jangkamasa untuk permohonan sedemikian dibuat dan bahawa apa yang perlu dilakukan oleh mahkamah adalah untuk mempertimbangkan sama ada interogatori yang dicadangkan adalah relevan dan perlu sama ada untuk menyelesaikan tindakan atau hal secara adil atau untuk menjimatkan kos.

Diputuskan, menolak rayuan:

(1) Interogatori merupakan suatu soal hak sekiranya dibuat sebelum penutupan pliding. Namun demikian, kebenaran untuk menyampaikan interogatori adalah perlu apabila dibuat selepas penutupan pliding. Mahkamah kemudiannya mempunyai budi bicara untuk memutuskan sama ada untuk memberikan atau menolak kebenaran yang dipohon. Dalam keadaan begitu, penjelasan yang memuaskan atas kelewatan adalah suatu keperluan. Dalam kes ini, perayu tidak memberi sebarang penjelasan atas kelewatan sedemikian melainkan menjelaskan keperluan untuk interogatori. Maka, penolong kanan pendaftar adalah betul dalam menolak permohonan atas kekurangan penjelasan untuk kelewatan (lihat ms 159D–I dan 160A–B).

(2) Isu-isu kelewatan dan merit tidak haruslah diambil sebagai isu berasingan dalam satu permohonan untuk interogatori. Merit hanya relevan sekiranya kedudukan yang berkaitan dengan kelewatan adalah sekata dalam ertikata berkenaan dengan imbangan di antara pemberian atau penolakan kebenaran yang dipohon, selepas mempertimbangkan penjelasan yang dikemukakan untuk kelewatan, sesuatu yang lain dikehendaki bagi menyengetkan imbangan walau apa cara pun. Dalam keadaan kes ini, memandangkan kelewatan dalam memfailkan saman sehingga penutupan pliding, yang mana kelewatan tidak dijelaskan, merit jika ada tidaklah relevan sama sekali (lihat ms 160B–E).]

Notes

For a case on application for leave to deliver interrogatories, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2435.

Cases referred to

Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan [1980] 2 MLJ 19 (refd)

Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng [1975] 1 MLJ 89 (refd)

Legislation referred to

Rules of the High Court 1980 O 25, O 26 rr 1, (1), 2

Leong Chuan Wah (*Tee Tan & Partners*) for the appellant.
Leong Khai Yan (*S Sothi Leong & Partners*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: The appellant/defendant is the secretary of Chee Sen Khor Moral Uplifting Society, Selangor and was sued on his own behalf and on behalf of all the other members of the committee and of the society in Suit No S5–22–648 of 1996. When the pleadings were closed, the respondent/ plaintiff on 27 February 1997 took out a summons for directions pursuant to O 25 of the Rules of the High Court 1980 ('the 1980 Rules'). Then on 11 July 1997, after the close of the pleadings, the appellant applied by summons pursuant to O 26 r 1(1) of the 1980 Rules for an order giving him leave to serve interrogatories upon the respondent and requiring the respondent to answer the interrogatories. At the hearing before the learned SAR, this summons of the appellant was dismissed on the ground that the appellant did not give any reason for the delay in the application by summons when made after the close of the pleadings. The appellant being dissatisfied with the said decision of the learned SAR now appeals to the judge in chambers against the same. Indeed, the said summons and the affidavit-in-support of it did not contain any reason for the delay in the making of the said application after the close of the pleadings.

Before me in this appeal, it is submitted that O 26 r 1 of the 1980 Rules does not prescribe any time period for such an application to be made. It is contended that the purpose for the seeking of the leave of the court under the said rule was purely to avoid the process for interrogatories from being abused. All that is necessary for the court to consider is whether the proposed interrogatories are relevant and necessary either for disposing fairly of the course or matter or for saving costs. If this is satisfied, the court ought to exercise the discretion in giving leave. In support, learned counsel for the appellant cited what Gill CJ said at p 90 in *Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89 (FC) as follows (at pp 90–91):

> In addition to all his other reasons for dismissing the application, the learned judge took the view that on the authority of *Ellis v Amber* (1877) 36 LT 410, he did not have to consider the application at all as the plaintiff had given no reason for presenting the interrogatories after the pleadings had been closed. But the case was decided under the old rule as to interrogatories. Cases decided under the old rule indicate that only in exceptional circumstances would the court give leave to deliver interrogatories after the close of the pleadings. The position under our new rule is that it is only in exceptional circumstances that an order for leave to deliver interrogatories will be made before the close of the pleadings. This is clear from the following passage in 22 *Atkin's Court Forms* (2nd Ed) at p 367:

> 'Although the court has jurisdiction to grant leave to interrogate at any stage of the proceedings, in practice leave will not be granted, unless there are exceptional circumstances, before the pleadings are closed and the issues to be tried are clearly defined. It has been said that interrogatories must relate to an issue between the parties, and since the issues are not generally clear until after defence, such a course would be very unusual and the burden on the applicant to persuade the court that leave should be given would be a heavy one. Indeed, interrogatories are not very often ordered (other than by consent) until after discovery has taken place.'
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> The learned judge, through an oversight, referred to the above passage for the contrary view.

In further support of his contention, learned counsel cited *Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1980] 2 MLJ 19 (FC) where at p 20 Chang Min Tat FJ said:

> Late though it was, we do not, in the circumstances of this case, think the application too late. The defendant can always be compensated by an order for costs and where the application occasions an adjournment, by an order for all costs thrown away.

Hence, it is submitted that the time for the filing of the application for interrogatories is not of a very material factor when considering whether to grant or to refuse the leave sought by the application. For that reason, it was contended that the learned SAR was wrong in dismissing the summons on the ground of delay on the part of the appellant.

For the respondent, it is being submitted that as the said application of the appellant before the learned SAR was not made within reasonable time, it is to be considered as it being done without bona fide. It is contended that at the summons for directions stage, the appellant did not seek for interrogatories. In the affidavit-in-support of the said application for interrogatories, no reason was given on behalf of the appellant for not having done so during the summons for directions stage. Therefore, it is not so much of the fact that the appellant was late in the filing of the said application for interrogatories but for the fact that it was done after the close of the pleadings without any explanation at all being given as to why it was thought necessary to do so. Thus, it would go to show that it was not so done bona fide. One of the purposes behind the need for interrogatories is to save costs. However, since the application was made after the suit had been set down for trial, if granted, it would not meet the said purpose. On the other hand, by so doing, additional costs are being incurred and would further delay the hearing of the suit. It is further submitted that the appellant by O 26 r 2 of the 1980 Rules could have served the interrogatories without leave before the close of the pleadings. Since that opportunity was not taken up, it is for the appellant now to explain to the satisfaction of the court to enable it to invoke its discretion to grant leave to do so at this late stage.

To resolve the issue raised in this appeal, it is appropriate to consider the operation of the relevant provisions of O 26 of the 1980 Rules itself.

The first thing to note is that O 26 r 2 is a new provision. There is no corresponding rule in the Rules of the High Court 1957 upon which the cases in *Sheikh Abdullah bin Sheikh Mohamed* and *Perubatan Berita Nasional Malaysia* were decided. To that extent therefore, the dicta cited earlier as found in the two cases are of no assistance to the appellant as the facts of the present case are governed by the express provisions of the 1980 Rules. As regards the new provisions in O 25 r 2 of the 1980 Rules, the learned author of *Mallal's Supreme Court Practice* (Vol 1) (2nd Ed) at p 337 said:

> This rule apparently permits the delivery without leave of the court by one party to the other interrogatories relating to any matter in question between the parties. But this is in direct conflict with O 26 r 1. *It is therefore suggested that the inclusion of this rule is a mistake.* (Emphasis added.)

With greatest respect, I do not think that it is at all a mistake in the face of the express intention of the Order itself. As clearly indicated in the passage quoted earlier in *Sheikh Abdullah bin Sheikh Mohamed*, in the relevant rule prior to the RHC 1957, only in exceptional circumstances would the court give leave to deliver interrogatories after the close of the pleadings which tend to suggest that for interrogatories, at whatever stage of the proceedings at all, leave must first be sought. It was not as a matter of right as so presently provided in O 26 r 2 of the 1980 Rules, if made before the close of the pleadings. However, since the coming into force of the RHC 1957, the converse is true, ie only in exceptional circumstances that an order for leave to deliver interrogatories will be made before the close of the pleadings. Still the position under the RHC 1957 would appear to be that leave at any stage was necessary, until the rule is superseded by the 1980 Rules. This is so when reference is made to p 367 of 22 *Atkin's Form* (2nd Ed) by the Federal Court wherein it is stated that the court has jurisdiction to grant leave to interrogatories at any stage of the proceedings. However, there was a radical change in the Rules of the High Court when the 1980 Rules came into force. This is reflected in O 26 rr 1(1) and 2 of the 1980 Rules itself. Under r 2, a party to any cause or matter may at any time *before the close of the pleadings* without leave of the court deliver interrogatories relating to any matter in question between the parties, which means that if made before the close of the pleading, it is made as a matter of right. Whereas, if not so done at that stage, then r 1 would apply wherein leave of the court is required. In other words, leave is only necessary when made after the close of the pleadings, as happens in this present case before me. Rule 1 involves the discretion of the court in deciding whether to grant or refuse the leave sought. Like any other discretion, it is to be exercised judiciously on settled principles as otherwise the need to come before the court for leave becomes a mockery. The first thing that an applicant in such a situation would face is to satisfactorily explain to the court as to why it was not done as so provided by r 2 to call for the need to come to court for leave. Thus the satisfactory explanation for the delay is a prerequisite. In this case, the appellant gave no explanation at all for such a delay except to explain the need for such interrogatories. The affidavit in support explains the need for them as being necessary for disposing fairly of the cause or matter and for saving costs and saving the

time of the court. As for the first two reasons, they are not really the reason explaining the delay because they were for the very purpose that interrogatories are necessary. As for saving the time of the court, as rightly submitted by learned counsel for the respondent, it creates a further increase in the time of the court. Therefore, on that ground for lack of explanation for the delay alone the decision of the learned SAR was correct in dismissing the said application of the appellant. Then there is another principle relating to any application for leave when made to the court. The applicant must show merit. To my mind, these issues of delay and merit are not to be taken as separate issues in that even if delay is not satisfactorily explained, the applicant can still get away with it by showing merit in the matter. To me, merit will come for consideration only if the position relating to delay is even in that in the balance between the granting or refusal of the leave sought, having considered the explanation put forward for the delay, something else is necessary to tilt the balance one way or the other. It is in such a situation only where merit in the matter is of relevance. However, if the reason for the delay is not forthcoming at all, then it is irrelevant to consider merit, as otherwise, for so long as there is merit in the matter, the applicant can choose his own time to seek for leave. In the circumstances of this case, in view of the delay in the filing of the summons until the close of the pleading, which delay remains unexplained, the merit if any is of no relevance at all. In his submission before me in this appeal, learned counsel for the appellant attempts at explaining the delay by putting the blame on the respondent. But these are statements from the Bar. There was nothing in the evidence as contained in the affidavit-in-support to indicate the blameworthiness on the part of the respondent. Such being the position, I have no alternative but to dismiss this appeal of the appellant with costs and to affirm the decision of the learned SAR.

Appeal dismissed.

Reported by Loo Lai Mee